IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

SA.No. 311 of 2003()

AS.21/2001 of I ADDL.DISTRICT COURT, ERNAKULAM
OS.152/1998 of ADDL.SUB COURT, KOCHI
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APPELLANTS: APPELLANTS/DEFENDANTS 1 TO 4 & 6
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1. **BEEVI, W/O. LATE HAMZA, 3/683, MANGALATHU PARAMBU, KOCHI-2**
2. **T.Y.NUSSAIN S/O. LATE YAHOO MOOPPAN, 3/666, MANGALATHU PARAMBU, KOCHI-2**
3. **T.Y.SHERIFF, S/O. LATE YAHOO MOOPPAN, 3/659, MANGALATHU PARAMBU, KOCHI-2**
4. **T.Y.BUSHAR JAMHAR S/O. LATE YAHOO MOOPPAN, BLOCK NO.3, ROOM NO. 33, POLICE QUARTERS, KOCHI-1**
5. **BEEVI KUNJI, W/O.LATE YAHOO MOOPPAN, DO. DO.**

BY ADV. SRI.S.K.BRAHMANANDAN
SRI.G.SREENIVASA PRABHU
SRI.S.B.PREMACHANDRA PRABHU

RESPONDENTS: RESPONDENTS/PLAINTIFFS 1 TO 4 & DEFENDANTS
---------- 5 & 7

1. **T.Y.NAFEESA D/O. LATE YAHOO MOOPPAN AND W/O.ABOO, RESIDING AT 3/685, MANGALATHU PARAMBU, KOCHI-2**
2. **T.Y.AISUVEE D/O. LATE YAHOO MOOPPAN, 3/637, MANGALATHU PARAMBU, KOCHI-2**

tss

3. T.Y.SULPHATH D/O. LATE YAHOO MOOPPAN,
   3/469, M.A.S.S.ROAD, KOCHI-2

4. T.Y.ASMA D/O. LATE YAHOO MOOPPAN,
   11/119, PUTHIYA PARAMBU, NEAR SEA GULL HOTEL,KOCHI

5. T.Y.LATHEEF S/O. LATE YAHOO MOOPPAN,
   3/659, MANGALATHU PARAMBU, KOCHI-2

6. T.Y.RABIYA W/O. K.K.PAREED, KADAVEL
   HOUSE, EDAPPALLY JUNCTION, EDAPPALLY, KOCHI-24

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.P.B.KRISHNAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

tss

M.SASIDHARAN NAMBIAR,J.

S.A.No.311 of 2003

Dated, this the 28th day of September,2007

JUDGMENT

Defendants 1 to 4 and 6 in O.S.152/1998 on the file of Sub Court, Kochi are the appellants. Respondents 1 to 4 are the plaintiffs and other respondents the defendants. Suit was filed seeking a decree for partition of two items of plaint schedule properties. Both are buildings. Item No.1 is tharwad house and item No.2 a line building having 7 separate door numbers. The case of plaintiffs was that both the plaint schedule buildings were constructed by yahu Moopan and on the death of Yahu Moopan it devolved on the plaintiffs and defendants. Yahu Moopan had four wives. At the time of filing of the suit only third wife, the 6th defendant the fifth appeallant was alive. Defendants 2 to 5 are her children. Apart from defendants 2 to 5

Hamza was also the son of Yahu Moopan and appellant No.5. First defendant is the widow of deceased Hamza. First plaintiff is his only daughter in the first wife. Second plaintiff is his only daughter in the second wife. Plaintiffs 3 and 4 are his only daughters in the third wife. Seventh defendant is the only daughter of deceased fourth wife. Defendants resisted the suit contending that item No.2 of plaint schedule properties did not belong to Yahu Moopan and the land belong to sixth defendant, which was subsequently assigned by sixth defendant to her sons and the buildings are not constructed by Yahu Moopan but by Hamza deceased son and his brothers and so that property is not available for partition.

2. Learned Munsiff on the evidence of PWs.1 and 2, DW1, Exts.A1 to A7 and B1 to B28 rejected the case of defendants that item No.2 of the plaint schedule line building was constructed by Hamza and his brothers and instead accepted the

case of plaintiffs that the building was constructed by Yahu Moopan and therefore all the legal heirs are entitled to the share.

3.There was no dispute with regard to the availability of item No.1 of the plaint schedule properties for partition or the quantum of shares. A preliminary decree for partition of plaint schedule buildings was passed directing division of the properties into 120 equal shares and allotment of 7 such shares to each of the plaintiffs and 14 such shares to each of defendants 1 to 5 and 15 shares to the sixth defendant and 7 such shares to the seventh defendant. Appellants challenged the decree and judgment before District Court, Ernakulam in A.S.21/2000. Learned Additional District Judge on appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. In the Second appeal preliminary decree in respect of item No.2 of plaint schedule

properties alone was challenged. There was no dispute with regard to the quantum of shares. Appellants contended that item No.2 of the plaint schedule buildings was not constructed by Yahu Moopan and it was constructed by deceased Hamza and his brothers after obtaining Exts.B2 and B3 plan and therefore the daughters of Yahu Moopan are not entitled to claim any share. Reliance was placed on Exts.B4 to B21 tax receipt and the correspondence to prove that the line building was owned by Hamza brothers and not by Yahu Moopan. It was therefore contended that the preliminary decree is not sustainable.

5.The appeal was admitted formulating the following substantial question of law.

Whether in the light of Exts.B2 to B21, findings of courts below that item No.2 of the plaint schedule properties was constructed by Yahu Moopan and therefore available for partition, is sustainable.

6. Learned counsel appearing for appellants

and respondents 1 to 4 were heard.

7. The argument of learned counsel appearing for appellants is that Ext.B2 and B3 plan establish that item two of plaint schedule buildings was constructed by Hamza and his brothers and not Yahu Moopan and evidence of DW1 that the signature seen in Ext.B2 and B3 establish that the plan and licence were obtained by Hamza and the evidence of DW1 with Exts.B3 to B21 establish that the building was constructed by Hamza brothers. It was also alleged that in the municipal register Hamza brothers are shown as owners of the building and in the absence of any other acceptable evidence, courts below should have found that the building was constructed by Hamza and his brothers and not by Yahu Moopan, and especially when the land belongs to sixth defendant, the mother of Hamza and brothers. Learned counsel further argued that as rightly found by the courts below, there is no evidence to prove that Exts.B2 and B3 plans and

the licence was obtained by either Hamza or his brothers and entry in the Muncipal register with regard to the ownership of the building is not a document of title and on that basis appellants are not entitled to contend that the building belongs to Hamza or his brothers or that it was not constructed by Yahu Moopan. It was also argued that evidence of PW1, second plaintiff, establish that when the building was constructed, Hamza was only aged less than twenty years and though it was claimed by DW1 that the building was constructed using funds of partnership firm of Hamza and brothers, no evidence was adduced to prove that there was a partnership firm by name Hamza and brothers or that the building was constructed with the funds of the firm and in such circumstance findings of courts below cannot be interfered.

8. Though it was contended that when the land stands in the name of first defendant which was subsequently transferred by sixth defendant

in favour of her sons, and the building cannot be owned by others, it cannot be disputed that the maxim "Quicquid inaedificatur Solo Cedit" is not applicable to India and as far as India is concerned, a third party can own a building in a land belonging to another . The crucial question is whether there is evidence to prove that building was constructed by Hamza and brothers, as claimed by appellants.

9. Though Exts.B2 and B3 plans were relied on, as rightly found by courts below, Exts.B2 and B3 do not establish that the plan was either submitted by Hamza and brothers or was obtained by Hamza and brothers. If the licence was produced, it would have thrown light as to who had applied for licence and who was permitted to construct the building. The suggestion given to DW1 was that if the licence was produced, it would falsify the case of the appellants and so it was not produced. No proper explanation was offered for the non-production of the licence,

especially when the plans were produced. Moreover, when it is the definite case of DW1, who was examined on behalf of the appellants, that the building was constructed using funds of the partnership firm Hamza and brothers, the non-production of the partnership deed or any other record establishing existence of a partnership firm in that name is correct. The courts below were justified in drawing a conclusion that the building was not constructed by Hamza and brothers. Courts below appreciated the evidence and rendered a factual finding that the building was constructed by yahu Moopan and not by Hamza and his brothers. I do not find any reason to interfere with the factual finding, on the evidence on record. In such circumstance, the preliminary decree can only be confirmed.

The appeal is dismissed confirming the preliminary decree passed by the trial court and confirmed by the first appellate court. It is made clear that the property directed to be

divided is only the buildings and not the land where the building stands.

M.SASIDHARAN NAMBIAR
JUDGE

Tpl/-